

HOUSE BILL NO. 844

INTRODUCED BY D. BARRETT

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING GROUND WATER APPROPRIATION LAWS IN CERTAIN
5 CLOSED BASINS; PROVIDING FOR CONSIDERATION OF MITIGATION OR ACTIONS TO OFFSET
6 ADVERSE EFFECTS WHEN MAKING A DETERMINATION REGARDING ADVERSE EFFECTS; PROVIDING
7 FOR SUBMISSION OF AQUIFER TESTING DATA TO THE BUREAU OF MINES AND GEOLOGY AND
8 ASSESSING A FEE; PROVIDING FOR A WATER SUPPLY AND PERMITTING STUDY; PROVIDING AN
9 APPROPRIATION; AMENDING SECTIONS 85-2-311, 85-2-329, 85-2-330, 85-2-340, 85-2-341, 85-2-342, AND
10 85-2-343, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY
11 DATE."
12

13 WHEREAS, the Montana Supreme Court's April 2006 decision in Montana Trout Unlimited v. Montana
14 Department of Natural Resources and Conservation, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, has been
15 interpreted by the Department of Natural Resources and Conservation in a manner that has essentially halted
16 ground water permitting in water basins in the Upper Missouri River Basin; and

17 WHEREAS, access to ground water supplies and the responsible permitting of ground water is absolutely
18 essential to the well-being of Montana citizens and the economy of Montana and is required under Article IX,
19 section 3(3), of the Montana Constitution; and

20 WHEREAS, the closure of the water basins in the Upper Missouri River Basin was done without careful
21 and considered consideration of water supply data, including inflows, outflows, and consumption within the basins
22 and an analysis of available surface water and ground water supplies; and

23 WHEREAS, the interpretation by the Montana Supreme Court of the term "prestream capture of tributary
24 ground water" is ill-advised and has resulted in a delegation of authority to the Department of Natural Resources
25 and Conservation under the basin closure statutes that provides no direction or guidance in the implementation
26 of ground water permitting provisions; and

27 WHEREAS, it is the intent of the Legislature to allow responsible ground water permitting to resume while
28 fully protecting senior water right holders from adverse effects under the provisions of Title 85, chapter 2, MCA,
29 and while the appropriate interim committee studies water supply issues and permitting issues for Montana's
30 closed basins in order to make sound water policy decisions.

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2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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4 **Section 1.** Section 85-2-311, MCA, is amended to read:

5 **"85-2-311. Criteria for issuance of permit.** (1) A permit may be issued under this part prior to the
6 adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is no
7 presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication
8 of existing water rights pursuant to this chapter. In making a determination under this section, the department may
9 not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water
10 reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant
11 proves by a preponderance of evidence that the following criteria are met:

12 (a) (i) there is water physically available at the proposed point of diversion in the amount that the
13 applicant seeks to appropriate; and

14 (ii) water can reasonably be considered legally available during the period in which the applicant seeks
15 to appropriate, in the amount requested, based on the records of the department and other evidence provided
16 to the department. Legal availability is determined using an analysis involving the following factors:

17 (A) identification of physical water availability;

18 (B) identification of existing legal demands on the source of supply throughout the area of potential
19 impact by the proposed use; and

20 (C) analysis of the evidence on physical water availability and the existing legal demands, including but
21 not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal
22 demands on the supply of water.

23 (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state
24 water reservation will not be adversely affected. In this subsection (1)(b), adverse ~~effect~~ effects must be
25 determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that
26 the applicant's use of the water will be controlled or exercised in a manner so that so the water right of a prior
27 appropriator will be satisfied; The plan for the exercise of the permit must include any plan to mitigate or offset
28 adverse effects on a prior appropriator WHEN THE APPLICANT'S USE OF THE WATER CANNOT BE CONTROLLED TO
29 SATISFY THE WATER RIGHT OF A PRIOR APPROPRIATOR.

30 (c) the proposed means of diversion, construction, and operation of the appropriation works are

1 adequate;

2 (d) the proposed use of water is a beneficial use;

3 (e) the applicant has a possessory interest, or the written consent of the person with the possessory
4 interest, in the property where the water is to be put to beneficial use;

5 (f) the water quality of a prior appropriator will not be adversely affected;

6 (g) the proposed use will be substantially in accordance with the classification of water set for the source
7 of supply pursuant to 75-5-301(1); and

8 (h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
9 with Title 75, chapter 5, part 4, will not be adversely affected.

10 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met
11 only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
12 satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met.
13 For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality
14 district established under Title 7, chapter 13, part 45, may file a valid objection.

15 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a
16 year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence
17 that:

18 (a) the criteria in subsection (1) are met;

19 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
20 following:

21 (i) the existing demands on the state water supply, as well as projected demands, such as reservations
22 of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum
23 streamflows for the protection of existing water rights and aquatic life;

24 (ii) the benefits to the applicant and the state;

25 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

26 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
27 made;

28 (v) the effects on private property rights by any creation of or contribution to saline seep; and

29 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
30 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

1 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the
2 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
3 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
4 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
5 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
6 with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be
7 met before out-of-state use may occur.

8 (b) The department may not issue a permit for the appropriation of water for withdrawal and
9 transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

10 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
11 subsection (1) or (3) are met;

12 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

13 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
14 of Montana.

15 (c) In determining whether the applicant has proved by clear and convincing evidence that the
16 requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

17 (i) whether there are present or projected water shortages within the state of Montana;

18 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
19 shortages within the state of Montana;

20 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
21 use the water; and

22 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
23 water.

24 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the
25 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and
26 use of water.

27 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other
28 evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other
29 evidence, including but not limited to water supply data, field reports, and other information developed by the
30 applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and

1 other specific field studies.

2 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,
3 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or
4 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,
5 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally
6 or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or
7 control waters within the boundaries of this state except in accordance with this section.

8 (7) The department may adopt rules to implement the provisions of this section."
9

10 **Section 2.** Section 85-2-329, MCA, is amended to read:

11 **"85-2-329. Definitions.** Unless the context requires otherwise, in 85-2-330 and this section, the following
12 definitions apply:

13 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state
14 water reservation pursuant to 85-2-316.

15 ~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake,
16 reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

17 ~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the
18 source of supply and in which substantially all of the water returns without delay to the source of supply, causing
19 little or no disruption in stream conditions.

20 ~~(4)~~(3) "Teton River basin" means the drainage area of the Teton River and its tributaries above the
21 confluence of the Teton and Marias Rivers."
22

23 **Section 3.** Section 85-2-330, MCA, is amended to read:

24 **"85-2-330. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of
25 subsection (2) of this section, the department may not ~~process~~ or grant an application for a permit to appropriate
26 water or for a reservation to reserve water within the Teton River basin.

27 (2) The provisions of subsection (1) do not apply to:

28 (a) an application for a permit to appropriate ground water;

29 (b) an application for a permit to appropriate water for a nonconsumptive use;

30 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;

- 1 (d) an application to store water during high spring flows; or
2 (e) emergency temporary appropriations as provided for in 85-2-113(3)."

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4 **Section 4.** Section 85-2-340, MCA, is amended to read:

5 **"85-2-340. Definitions.** Unless the context requires otherwise, in 85-2-341 and this section, the following
6 definitions apply:

7 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state
8 water reservation pursuant to 85-2-316.

9 (2) "Ground water" ~~means water that is beneath the land surface or beneath the bed of a stream, lake,~~
10 ~~reservoir, or other body of surface water and that is not immediately or directly connected to surface water~~ has
11 the meaning provided in 85-2-102.

12 (3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the
13 confluence of the Jefferson and Missouri Rivers.

14 (4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the
15 confluence of the Madison and Jefferson Rivers.

16 (5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source
17 of supply and in which substantially all of the water returns without delay to the source of supply, causing little
18 or no disruption in stream conditions."

19

20 **Section 5.** Section 85-2-341, MCA, is amended to read:

21 **"85-2-341. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of
22 subsection (2) of this section, the department may not ~~process or~~ grant an application for a permit to appropriate
23 water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

24 (2) The provisions of subsection (1) do not apply to:

- 25 (a) an application for a permit to appropriate ground water;
26 (b) an application for a permit to appropriate water for a nonconsumptive use;
27 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;
28 (d) an application to store water during high spring flows; or
29 (e) temporary emergency appropriations as provided for in 85-2-113(3)."

30

1 **Section 6.** Section 85-2-342, MCA, is amended to read:

2 **"85-2-342. Definitions.** Unless the context requires otherwise, in 85-2-343 and this section, the following
3 definitions apply:

4 (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state
5 water reservation pursuant to 85-2-316.

6 ~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake,~~
7 ~~reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

8 ~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the
9 source of supply and in which substantially all of the water returns without delay to the source of supply, causing
10 little or no disruption in stream conditions.

11 ~~(4)~~(3) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries
12 above Morony dam."

13

14 **Section 7.** Section 85-2-343, MCA, is amended to read:

15 **"85-2-343. Basin closure -- exceptions.** (1) As provided in 85-2-319 and subject to the provisions of
16 subsection (2) of this section, the department may not ~~process~~ or grant an application for a permit to appropriate
17 water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been
18 issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

19 (2) The provisions of subsection (1) do not apply to:

20 (a) an application for a permit to appropriate ground water;

21 (b) an application for a permit to appropriate water for a nonconsumptive use;

22 (c) an application for a permit to appropriate water for domestic, municipal, or stock use;

23 (d) an application to store water during high spring flows;

24 (e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun
25 River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

26 (f) temporary emergency appropriations as provided for in 85-2-113(3)."

27

28 NEW SECTION. **Section 8. Aquifer testing, test well, or monitoring well data submission -- not**
29 **beneficial use -- FEE.** (1) All aquifer testing data and other related information from test wells, monitoring wells,
30 or other sources that is collected for the purpose of obtaining a new appropriation right under 85-2-330(2)(a),

1 85-2-341(2)(a), or 85-2-343(2)(a) must be submitted to the department and the bureau of mines and geology.
2 The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into
3 the ground water information center database as part of the ground water assessment program.

4 (2) (a) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit
5 application.

6 (b) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water
7 level monitoring, or other testing or monitoring of a water source.

8 (3) AN ENTITY SUBMITTING DATA PURSUANT TO THIS SECTION SHALL REMIT A FEE IN THE AMOUNT OF \$15 FOR
9 EACH SUBMITTAL.

10
11 NEW SECTION. Section 9. Water supply and permitting study. (1) During the 2007-2008 interim,
12 the legislature intends that water supply studies be conducted to assess water availability issues in the closed
13 basins of the Upper Missouri River basin, as defined in 85-2-342, and to examine water permitting, particularly
14 permitting of ground water. The appropriate interim committee of the legislature is directed to conduct a study,
15 including but not limited to the following:

16 (a) water supply analyses in the basins, including an assessment of water supplies, water use, and
17 consumptive uses so that data and information on the water balance of the basins may be obtained in a useful
18 form;

19 (b) an analysis or assessment to determine if or how ground water development is affecting water
20 availability in the basins;

21 (c) an analysis of water permitting in the basins, including whether ground water appropriators should
22 be required to provide mitigation or augmentation plans and, if so, the appropriate requirements for any mitigation
23 or augmentation plans; and

24 (d) an assessment of data and information required for ground water permitting in the basins, including
25 an analysis of information that should be required such as any water quality data related to ground water
26 permitting involving mitigation or augmentation; and

27 (e) what type of information should be made available to policymakers in order to accurately assess
28 water supply issues.

29 (2) The interim committee shall prepare a report to the 61st legislature and shall prepare any proposed
30 legislation that the interim committee believes will clarify water permitting issues in closed basins.

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2 **NEW SECTION. Section 10. Appropriation.** (1) There is appropriated \$20,000 from the general fund
3 to the Montana bureau of mines and geology for the biennium beginning July 1, 2007, for the purpose of
4 collecting information under [section 8] related to ground water.

5 (2) There is appropriated \$50,000 from the general fund for the biennium beginning July 1, 2007, to
6 legislative services division for the purpose of performing the study described in [section 9].

7

8 **NEW SECTION. Section 11. Beneficial use permits confirmed.** All beneficial water use permits
9 issued by the department in basins described in 85-2-329, 85-2-340, and 85-2-341 prior to April 11, 2006, and
10 not subject to judicial review on [the effective date of this act] are recognized and confirmed subject to the
11 provisions of 85-2-313.

12

13 **NEW SECTION. Section 12. Codification instruction.** [Section 8] is intended to be codified as an
14 integral part of Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to [section 8].

15

16 **NEW SECTION. Section 13. Effective date.** [This act] is effective on passage and approval.

17

18 **NEW SECTION. Section 14. Retroactive applicability.** Subject to [section 11], [sections 1 through 7]
19 apply retroactively, within the meaning of 1-2-109, to any application for a beneficial use permit for an
20 appropriation right in a closed basin described in 85-2-329, 85-2-340, and 85-2-341 before or after [the effective
21 date of this act].

22

- END -